think that this ought to be allowed for the sake of the debtor's solicitor. I cannot see any reason why the creditors should pay the costs of the debtor's solicitor if the debtor is unable to do so, nor do I believe that a solicitor accepting the retainer of a person against whom bankruptcy proceedings are pending does so in reliance on the view that the petitioner's solicitor may blunder and thus give him the advantage of an order for costs against the petitioner. Therefore, we propose to grant the stay which is asked for.

I would adopt fully the decision of the Court of Appeal to the present case. Hence, in the exercise of my unfettered discretion, I find it just to grant a set-off of the debtor's taxed costs of $14,576 against the judgment debt of a much more substantial sum of $2,603,913.28 notwithstanding the debtor's solicitor's lien.

Application allowed.

Solicitors: *Lim Huck Aik & Co; Ooi, Lee & Co.*

Reported by *Azra Moiz*

Public Prosecutor v Veeran Kutty & Anor

HIGH COURT (IPOH) — PERAK CRIMINAL TRIAL NOS 13 AND 13A OF 1983
PEH SWEE CHIN J
20 APRIL 1990

Criminal Law — Unlawful possession of revolver and ammunition — Accused leading police to revolver and rounds — Internal Security Act 1960, s 57

Criminal Procedure — Cautioned statement — Breach of lock-up rules — Whether interrogation oppressive — Whether statement made voluntarily — Whether necessary to reduce interrogation to writing — Criminal Procedure Code (FMS Cap 6), s 112

Evidence — Impeachment of witness — Admission of cautioned statement only for impeachment — Weight to be attached to evidence — Similar fact evidence — Probative value versus prejudicial effect — Res gestae — Evidence Act 1950, s 27

Words and Phrases — 'Whenever possible' — Criminal Procedure Code (FMS Cap 6), s 112

The two accused and some others took part in a robbery at Batu Gajah on 7 September 1983. They were apprehended outside the town after being chased by police. During the chase they were observed to have been holding a pistol each. When arrested, they were no longer in possession of the pistols. After being interrogated, both accused led the police back to the place where they were arrested and two pistols and 11 rounds of ammunition were recovered. They were subsequently charged under the Internal Security Act 1960 for unauthorized possession of firearms. In the course of the trial the prosecution sought to admit the accused's cautioned statements and the defence sought to introduce evidence of the armed robbery. Both applications were objected to by the respective opposing parties.

Held, convicting both accused:

(1) There was a breach of the lock-up rules in that the second accused was returned to the lock-up after 6pm. However, the circumstances attending the breach did not amount to oppression making the cautioned statement of the second accused inadmissible.

(2) A total of four hours of interrogation before the statement was recorded could not be construed as oppressive in any way and the cautioned statements of the accused were admissible.

(3) The cautioned statement of the first accused was admissible for the purpose of impeaching his credit, but only as regards the passages underlined for the impeachment of the credit of the first accused.

(4) However, the evidence of the first accused could not be regarded as completely worthless when considered in connection with other evidence and it affected the question of weight to be given to all the evidence of the first accused.

(5) Similar fact evidence may be allowed if it has a sufficient degree of probative force to override any prejudicial effect that it might have and that the said sufficient degree would exist if such evidence of similar fact is very relevant as being strikingly similar that to exclude it would be an affront to common sense. The evidence of the armed robbery was therefore admissible.

(6) The words 'whenever possible' in s 112(v) of the Criminal Procedure Code ought to mean 'whenever reasonably possible'. Given the circumstances of the accused persons' arrest and interrogation, it was not reasonable to expect the interrogation to be reduced to writing.

[Bahasa Malaysia summary

Kedua-dua orang yang tertuduh dan beberapa orang yang lain telah mengambil bahagian di dalam satu rompakan di Batu Gajah pada 7 September 1983. Mereka telah ditangkap di luar bandar itu setelah dikejar oleh pihak polis. Semasa kejaran itu mereka telah diperhatikan membawa sepucuk pistol seorang. Apabila ditangkap, mereka tidak lagi memiliki pistol-pistol itu. Setelah disoal-siasat, kedua-dua orang yang tertuduh itu telah membawa pihak polis balik ke tempat di mana mereka ditangkap dan dua pucuk pistol dan 11 rangkaian peluru telah dijumpai. Mereka kemudiannya dituduh di bawah Akta Keselamatan Dalam Negeri 1960 kerana memiliki senjata api secara haram. Semasa perbicaraan, pihak pendakwa cuba memasukkan pernyataan beramaran yang dibuat oleh yang tertuduh dan pihak pembela cuba memasukkan keterangan tentang rompakan bersenjata itu. Kedua-dua permohonan itu telah dibantah oleh pihak-pihak menentang masing-masing.

Diputuskan, mensabit kedua-dua orang yang tertuduh:

(1) Kaedah-kaedah lokap telah dilanggar apabila yang tertuduh yang kedua dibawa balik ke lokap selepas pukul 6 petang. Walaubagaimanapun keadaan dalam mana pelanggaran itu berlaku tidak merupakan penindasan yang mengakibatkan ketidakbolehterimaan pernyataan beramaran yang tertuduh yang kedua.

(2) Persoalan selama empat jam sebelum pernyataan itu dirakamkan tidak boleh disifatkan sebagai penindasan sama sekali dan pernyataan beramaran yang tertuduh boleh diterima.

(3) Pernyataan beramaran yang tertuduh yang pertama boleh diterima bagi tujuan mencabar kebolehpercayaannya, tetapi cuma setakat bahagian yang digariskan untuk mencabar kebolehpercayaan yang tertuduh yang pertama.

(4) Walaupun begitu, keterangan yang tertuduh yang pertama tidak boleh dianggap tidak bernilai sama sekali bila ditimbangkan bersangkutan dengan keterangan yang lain dan ia menpengaruhi soal keberatan yang diberikan kepada semua keterangan yang tertuduh yang pertama.

(5) Keterangan sama fakta (similar fact evidence) boleh dibenarkan jika ia mempunyai kuasa probatif yang cukup untuk mengatasi apa-apa kesan prasangka yang ia mungkin ada. Kuasa probatif yang cukup muncul jika keterangan sama fakta sebegitu adalah sangat relevan kerana tersangat sama sehinggakan jika ia tidak diterima, itu akan menghina akal budi. Oleh itu, keterangan tentang rompakan bersenjata itu boleh diterima.

(6) Perkataan-perkataan 'whenever possible' dalam s 112(v) Kanun Acara Jenayah patut membawa makna 'whenever reasonably possible'. Dalam keadaan penangkapan dan persoalan yang tertuduh, adalah tidak menasabah untuk mengharapkan persoalan itu dirakamkan secara bertulis.]

[*Editorial Note*: The accused have appealed to the Supreme Court vide Criminal Appeal No 05-52-89.]

Cases referred to

1 *Dato' Mokhtar bin Hashim & Anor* v *PP* [1983] 2 MLJ 232 (distd)
2 *R* v *Priestley* (1966) 51 Cr App R 1 (refd)
3 *Teh Cheng Poh* v *PP* [1979] 1 MLJ 50 (folld)
4 *Boardman* v *DPP* [1975] AC 421 (folld)
5 *Makin* v *A-G for New South Wales* [1894] AC 57 (refd)
6 *PP* v *Ong Kok Tan* [1969] 1 MLJ 118 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 112
Evidence Act 1950 s 27

Zainal Abidin bin Kamaruddin (Deputy Public Prosecutor) for the Public Prosecutor.
Dato Paramjit Singh for the accused.

Cur Adv Vult

Peh Swee Chin J: The charges against the first accused were:

First charge
That you on 7 September 1983 at about 4pm near Sungai Kinta, at 1st milestone Jalan Gopeng, Batu Gajah, in the District of Batu Gajah, in the State of Perak, in a security area as proclaimed vide Gazette Notification vide PU(A) 148/69, without lawful excuse did have under your control a revolver Police Positive Special Colt .38 PT FA Mfg Co Hartford Conn USA, Serial No 742851, without lawful authority, and that you have thereby committed an offence punishable under s 57(1)(a) of the Internal Security Act 1960 (Rev 1972).

Second charge
That you on 7 September 1983 at about 4pm near Sungai Kinta, at 1st milestone Jalan Gopeng, in the District of Batu Gajah, in the State of Perak, in a security area as proclaimed vide Gazette Notification PU(A) 148/69, without lawful excuse did have under your control five rounds of .38 live ammunitions without lawful authority, and that you have thereby committed an offence punishable under s 57(1)(b) of the Internal Security Act 1960 (Rev 1972).

The charges against the second accused were:

First charge
That you on 7 September 1983 at about 5pm near Sungai Kinta, at 1st milestone Jalan Gopeng, Batu Gajah, in the District of Batu Gajah, in the State of Perak, in a security area as proclaimed vide Gazette Notification vide PU(A) 148/69, without lawful excuse did have under in your control a Smith & Wesson .32 pistol (long) Serial No H 617 without lawful authority, and that you have thereby committed an offence punishable under s 57(1)(a) of the Internal Security Act 1960 (Rev 1972).

Second charge
That you on 7 September 1983 at about 5pm near Sungai Kinta, at 1st milestone Jalan Gopeng, in the District of Batu Gajah, in the State of Perak, in a security area as proclaimed vide Gazette Notification PU(A) 148/69, without lawful excuse did have under your control six rounds of .32 live ammunitions without lawful authority, and that you have thereby committed an offence punishable under s 57(1)(b) of the Internal Security Act 1960 (Rev 1972).

Both accused were found guilty as charged at the end of the trial, convicted and sentenced to death.

Very briefly, the facts were that on the morning of 7 September 1983, both the accused and some others took part in a daring robbery at the Batu Gajah office of Malayan Borneo Finance. When they left the scene, they found their pre-arranged getaway car hemmed in and blocked accidentally by other cars; they seemed to have obtained a lift or forced a motorist to take them to an open area just outside the town at the 1st milestone Batu Gajah/Gopeng Road near the Sungei Kinta there. The open area was busy and fairly heavily shrubbed. The police were alerted.

Insp Zambri (PW4) with a police party on arrival at the said open space saw two persons each of whom was holding a pistol. He identified them as the first and second accused. Both accused bolted and Insp Zambri with Sgt Latiff and Cpl Rahman gave chase to the second accused while DPC Saidin split and pursued the first accused.

Insp Zambri fired two shots calling for the second accused to stop. He stopped with both his hands up and was arrested. The pistol which the second accused was seen holding earlier was not found on him.

DPC Saidin pursued the first accused and soon lost sight of him in the undergrowth.

In the meantime, D/Cpl Puad who was with another police party headed by Insp Azmi, waited alone in ambush at a place where there were undergrowth and banana trees. After about ten minutes, he saw a person crawling out from the bushes nearby with no weapon seen with him. D/Cpl Puad ran towards him until about 10 ft from him aiming his pistol at him. He asked for help through his walkie-talkie and shouted for help. Insp Azmi and DPC Saidin came in answer and they arrested the first accused.

After their arrest, both accused were questioned at the police station. The first accused was questioned by Insp Jimos for some time, and according to Insp Jimos, the first accused told him he 'agreed to lead me to a spot where he hid a pistol ...'.

As a result of this information, Insp Jimos, the first accused, a police photographer and two detectives went to the area where he was arrested, ie 1st milestone Jalan Batu Gajah/Gopeng. On arriving at the bridge there the first accused asked them to stop. The accused was looking left and right as if he was trying to identify the place. After five to ten minutes' walk from the main road, the first accused pointed to a spot where he said he had buried a pistol. They went closer to the spot so pointed out. Insp Jimos saw a pistol butt protruding from the ground. He immediately asked the police photographer to photograph it. The photo shown (D9B) was identified by him. He also met Insp Sahadan there later and the latter wanted to use the same photographer.

Insp Jimos, after the pistol was photographed, took it from the ground which was sandy and in which he said it was apparently buried. He unloaded the weapon and found five rounds of ammunition in it. It was a .38 Police Positive Special, Colt bearing serial number of 742851. This weapon was produced and shown to Insp Jimos who identified it. The court also examined the serial number on it and found it tallied with that given by Insp Jimos who also said the three live bullets and two blank ones shown to him were similar to the ones recovered.

In the case of the second accused, Insp Sahadan was instructed to interrogate the second accused at the Balai Polis, Batu Gajah; and the second accused agreed to show him where the pistol was. Insp Sahadan, two other policemen and the second accused went to the place of the incident, ie 1st milestone Jalan Batu Gajah/Gopeng. At the area, Sgt Latiff in the police party stopped near the bridge over Sungei Kinta as he had been there earlier. There he saw Insp Jimos with the police photographer who joined Insp Sahadan. Somewhere there, the second accused pointed out the place where the pistol was. At the place there were many small bushes and lallang, he saw a pistol hidden there lying on the ground among some small bushes. He asked the police photographer to photograph it and he identified the photograph. The pistol was a .32 Smith & Wesson bearing the serial number of 617, loaded with six bullets which were live bullets. Those shown in court to be including two empty casings (spent cartridges) were identified. If the second accused had not pointed out the place, he said that he would not have found it. Later he handed the weapon and the six bullets to ASP Husni. Insp Sahadan identified the pistol and bullets and photographs taken earlier of them.

ASP Ishak, an armaments officer, said he received from ASP Husni the two pistols in question with their five rounds and six rounds of ammunition respectively. He test-fired the Colt pistol with two of five rounds, and found he could shoot the two rounds, similarly with the Smith & Wesson revolver with two out of its six rounds. He gave his report to ASP Husni together with the said firearms.

ASP Husni produced the two pistols and the bullets, including the empty casings left behind from the test-firing and duly identified them.

For reasons best known to the prosecution, it decided not to attempt to tender then a cautioned statement recorded from the first accused but not so in the case of the second accused.

ASP Mat Hassan then of the Secret Societies Branch, Ipoh, on instruction, recorded a cautioned statement from the second accused. On learned defence counsel's objection to it, a trial-within-a-trial was held to determine its admissibility. He said it was recorded at Insp Sahadan's office at Batu Gajah Police Station from the second accused, ie Baharuddin bin Awang who preferred to speak Bahasa Malaysia, his mother tongue. ASP Hassan said there was no language problem between them. He administered the caution in those words: 'adalah kewajipan saya memberi amaran kepada kamu, bahawa kamu tidak diwajibkan kata apa-apa atau menjawab apa-apa soalan tetapi apa-apa yang kamu katakan samada sebagai menjawab kepada sesuatu soalan atau tidak, boleh diberi sebagai keterangan'. The second accused said he understood the caution. He said 'yes' to the question whether he wanted to give statement voluntarily and 'no' to the question whether he had been threatened, induced or promised (anything) to give a statement. ASP Hassan said he himself did not so induce or promise or threaten the second accused, etc. He did not see any injury on the second accused, who did not complain about anything to him. When the statement was recorded, it was read back and explained to the second accused who did not want to correct it and who signed it. He had never seen the accused before, and he finished recording it at 5pm, he having commence recording it at 3.15pm on 8 September 1983.

In cross-examination he reiterated substantially what he said earlier. Inter alia, he agreed that each time a prisoner was removed from the lock-up, an entry would be made in the lock-up diary, and he did not check up the lock-up diary. The prosecution then closed its case at the trial-within-a-trial and learned defence counsel called straightaway the second accused to the box.

The second accused said the statement was not voluntarily made. After his arrest, he was interrogated by

Insp Hambali, Insp Sahadan and two male Indian policemen whose names he did not know. He was assaulted by the four police personnel and subjected to prolonged interrogation, and further Insp Hambali warned him that if he were to tell ASP Hassan about these, he would be further beaten up. Thus, he said that he was still frightened when he gave the statement to ASP Hassan.

In cross-examination he said that he was continuously assaulted by Insp Hambali from the day of his arrest until the following day. He said that he was assaulted at about 10.45am on 7 September 1983. He said he was assaulted, many of them joined in and therefore he did not know how Insp Sahadan assaulted him. The two male Indian policemen were a police constable and a detective. Some Indian policemen were called for the second accused to identify and he identified DPC George Lingam. He said that he had signed the cautioned statement as asked and he was not sure if he understood the statement when it was read back to him.

ASP Husni was recalled by the defence to give evidence on its behalf. ASP Husni said the movements of this second accused would have been recorded in the lock-up register and the person in charge of the lock-up was the OCS of Batu Gajah police station. The second accused was also in the lock-up at Parit police station. He agreed that prisoners should not be taken out after 6pm and that Insp Hambali had interrogated the second accused.

Sub-Insp Ali, OCS Batu Gajah police station, was next called by the defence, and referring to the lock-up register said there were three entries, one on 7 September 1983 and the other two on 8 September 1983. The entry on 7 September 1983 at 11am mentioned that Insp Zambri and others brought the second accused. The first entry on 8 September 1983 stated that at about 9.45am, Insp Hambali brought the second accused and the first accused (names given) etc. The second entry on 8 September 1983 stated that both accused were taken out of the lock-up at about 10am. From about 11.30am on 7 September 1983 till 9.45am on 8 September 1983, the second accused was not put in the lock-up, for he was in the detectives' room. He said that no prisoner could be taken out of the lock-up after 6pm and after 6pm they could not be interrogated. He said that it was up to the officer in charge to decide to keep a suspect in the room.

In cross-examination, he agreed that an officer would ask for a detainee to be kept out of the detectives' room and there was nothing wrong for a detainee to be put in the detectives' room for interrogation and it was extremely inconvenient to interrogate him in the lock-up. He agreed that to the effect that it was alright if an officer did not want a detainee to be kept together with others in the lock-up.

Sgt Abdul Ghani, OCS of Parit police station, was called by defence and he stated that there was only one entry in the lock-up register regarding the second accused on 8 September 1983 when the second accused was brought at 7.20pm into the lock-up.

Insp Sahadan was recalled by the prosecution for evidence in rebuttal of the second accused's accusation of being assaulted. Insp Sahadan denied having ever assaulted or threatened the second accused or that he carried any stick or rubber hose for the purpose.

Similarly Insp Hambali was called and he denied the assaulted or carrying of any stick or rubber hose.

DPC George Lingam was recalled for the same purpose and he denied similarly. DPC Viswanathan was also called for similar purpose and he denied similarly.

Superintendent Nordin, then OCPD Batu Gajah, was called and he said he was instructed to keep the two accused apart from each other, and the second accused was kept in the detectives' room; and that there was no complaint from either accused. The second accused was not kept in the lock-up (after arrest) and there were times when arrested persons were detained overnight in a detectives' room.

I heard submission from both counsel on which I will comment later, and at the end of it all, the court admitted in evidence the cautioned statement on the ground that the prosecution had proved beyond a reasonable doubt that the statement was voluntarily made and that there was no threat, or promise or inducement given to the second accused.

The only point that merited serious attention was that the second accused was not put in the lock-up overnight by 6.30pm, but instead he was kept in a detectives' room. Superintendent Nordin had given evidence that he gave instructions for the two accused to be kept apart from each other. The court accepted the explanation for the second accused not having been put in the lock-up by 6pm on 7 September 1983. I found it a minor breach of the Lock-Up Rules amounting to a minor transgression in the circumstances. It was totally out of proportion to compare the facts here to the facts in *Dato' Mokhtar bin Hashim & Anor* v *PP*,[1] in which Rahmat Satiman, the second appellant there had been kept in the lock-up of Gombak Police Station for 42 days when the Federal Court found he had spent the better part of those 42 days as evident from the lock-up register there under prolonged interrogation by a team of eight police personnel and the long hours of interrogation were extremely odd hours ranging into early hours of the morning in breach of r 20 of the Lock-Up Rules, amounting to oppression within the definition by Sachs J in *R* v *Pristley*.[2] Here, the statement began to be recorded at 3.15pm on 8 September 1983, after the accused was arrested on 7 September 1983. A total of four hours of interrogation before the statement was recorded could not be construed as oppressive in any way. I saw all

the witnesses in the trial-within-the-trial and from their demeanour, I was satisfied that the second accused had not raised a reasonable doubt on the prosecution's case in the trial-within-the-trial and that the statement was voluntary in the sense that there was no promise, inducement or threat of the kind in question, neither was there any oppression.

The defence of both accused was called, and the matter took a surprising turn in that both accused gave evidence of their participation in the robbery at the Malaya Borneo Finance. I will have more to say about the reasons for the change of mind manifested by the defence and its effect and the submissions of counsel on the admissibility of the evidence of robbery.

The first accused stated that in the robbery he was not armed at all, he went in with the others who were armed with pistols and in particular, one Fong had the pistol and he saw Fong burying it at the scene when it was recovered by the police as the place was pointed out by himself to the police at the scene. Of the persons taking part in the robbery only one Harry and Fong were armed. In other words, the first accused meant to say he and the second accused were not armed.

Application for impeaching the credit of the first accused was made to court, and the court allowed the application to proceed on account of prima facie material discrepancies between the first accused's evidence and certain passages in the statement which was in fact the cautioned statement of the first accused. A trial-within-a-trial was again held. The discrepancies would be set out later.

The recording officer, DSP Alwi, was called who told the court of the administration of caution, about the absence of injury on the first accused, about having no difficulty in the first accused and him in communicating with each other; about giving no promise, threat or inducement of any kind to the first accused.

The first accused in the trial-within-the-trial stated that he was arrested on 7 September 1983 and detained overnight, not in lock-up but the CID room and was subject to prolonged interrogation by nine or ten police personnel the whole night through, and he was not allowed to sleep. He was deprived of food and drink and was assaulted in the course of interrogation. He was afraid of informing DSP Alwi of this. When cross-examined, he agreed that DSP Alwi did not give any inducement, threat or promise, neither did he assault him. He had just got over the interrogation and was under pressure when he gave the cautioned statement. He remembered it was Insp Jimos, DPC Lingam and two others whose names he did not know. Bare hands were used in assaulting him. He wanted to pour out everything to DSP Alwi and he felt relieved after doing so.

An Indian detective had given him an inducement by saying that he would 'timbangkan' if he surrendered a pistol. Apparently, he then told the police he would show them the place where he saw the said Fong burying the pistol. That inducement if it was true, led to the discovery of pistol, and not the inducement in connection with the cautioned statement, be it noted.

DPC George Lingam gave evidence and denied having assaulted the first accused, neither did he see anyone else doing so.

Insp Jimos also denied in evidence that he had assaulted him. DPC Sho Soo Keng said on 7 September 1983, at 6pm, food was supplied to the first accused. He never assaulted him also. The food, consisting of fish and rice came from the station canteen.

It was submitted by learned defence counsel that the Lock-Up Rules had been breached in that the first accused was not locked up after 6pm in the lock-up. *Datuk Mokhtar Hashim*'s case[1] was cited.

For the similar reasons I gave in regard to the cautioned statement of the second accused, I found that the prosecution had proved beyond a reasonable doubt that the cautioned statement was voluntary in that there was no inducement, or threat, or promise of the kind given by DSP Alwi to the first accused and that there was no pressure on the first accused. The cautioned statement was therefore admitted, but of course only as regards the passages underlined for the impeachment of the credit of the first accused.

The underlined passages were to the effect that it was Fong who gave him and the second accused a pistol each. Another short passage related to the part the first accused played in the robbery, as compared with the somewhat watered-down version of his evidence. The last short passage stated to the effect that he had led the police to the place where he had buried the pistol. The prosecution therefore succeeded in proving that the first accused had spoken of those passages, but I ruled that his evidence could not be regarded as completely worthless considered in connection with other evidence and it affected the question of weight to be given to all the evidence of the first accused.

Both accused were found guilty as charged and were convicted. I will deal with the submission of learned counsel on various points.

I will deal with the points that were raised by the defence. First, I deal with the defence changing horses in midstream in adducing or wanting to have on record evidence of the robbery.

In the early part of the case, the prosecution adduced evidence touching on the robbery, and the defence had objected to it as being prejudicial but the learned deputy

said it was admissible as it formed part of the transaction related to the charges. Before the submission ended and the court made a decision, the learned deputy, after a short adjournment agreed to the objection. The evidence of the robbery was kept out.

Before the end of the prosecution and especially in the submissions of no case to answer, the defence changed its mind and submitted that the evidence of robbery, kept out by the court being asked to expunge from the record such evidence should be resurrected. This time it was the learned deputy's turn to object it on the ground that it was prejudicial and learned defence counsel had a new argument which had by then already fallen into desuetude for reasons that will be clear later.

Learned defence counsel submitted to the effect that the court should see the evidence for what it was, ie an armed robbery, to avoid a miscarriage of justice to the accused who were in danger of being convicted under s 75(1) of the Internal Security Act 1960 (under which the charges were framed) and punishable with a death sentence. The accused should have been charged, or could have their present charges reduced and could be convicted for a lesser offence of armed robbery under the Penal Code, or as under the Arms Act 1960 or the Firearms (Increased Penalties) Act 1971.

A similar argument was posed to the Privy Council in *Teh Cheng Poh* v *PP*[3] on the ground that the Attorney General's decision to prosecute under s 75(1) of the Internal Security Act had deprived the accused (charged with a similar offence) of his right under art 8(1) of the Constitution which is set out below:

> All persons are equal before the law and entitled to equal protection of the law.

The argument did not find favour with the Privy Council who held that the Attorney General could so choose under art 145(3) of the Constitution, ie 'the Attorney General shall have power, exercisable at his discretion to institute, conduct and discontinue any proceedings for an offence other than proceedings before a Muslim court, a native court or a court martial'.

The submission of learned counsel in the instant case was therefore to no avail; and in calling for the defence, I dealt with the submissions on this point by upholding the submission of the learned deputy about the evidence being prejudicial. My reasons were as follows.

Given the gravity of the offences in the instant case, the evidence of armed robbery was too prejudicial to be allowed despite its technical relevance, ie though it was admissible, eg just to quote only section of the Evidence Act 1950, ie s 6 for being connected to the fact in issue, ie the possession of the firearms in question. It happened to be evidence of bad character of the worst type against the accused though it was part of res gestae.

Since the conclusion of the instant case, I have come across a highly readable and most interesting article entitled 'Similar fact evidence: the principles of admissibility' by Mr Jeffrey Pinsler LLM (Cantab), Senior Lecturer, National University of Singapore in [1989] 2 MLJ lxxxi touching on the impact of the case of *Boardman* v *DPP*[4].

In the instant case, if evidence of the armed robbery, should the prosecution adduce evidence of it, would certainly have shown that both accused, *while being armed with revolvers*, committed armed robbery, the evidence of both the accused being armed with revolvers would be similar in nature to the fact in issue, the possession of firearms, and would have been evidence of similar fact as well.

Now, the well-known passage or ratio decidendi of the celebrated case of *Makin* v *A-G for New South Wales*[5] as follows:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

That passage has very often caused a great deal of confusion in practice, not the least of the reasons being its clause: '... or to rebut a defence which otherwise be open to the accused'. The *Boardman* case[4] has, as correctly pointed out in the article mentioned above, determined that such evidence of similar fact would be allowed if it has a sufficient degree of probative force to override any prejudicial effect that it might have and that the said sufficient degree would exist if such evidence of similar fact is very relevant as being strikingly similar that to exclude it would be (quoting Lord Hailsham in that case), 'an affront to common sense'.

The prosecution in the instant case, when about to, or just beginning to adduce the evidence of both the accused being armed with revolvers robbing the victim in question, voluntarily decided not to do so or was stopped in its tracks by the defence from doing so. Such evidence, if adduced, would be so strikingly similar to the evidence relating to the charge of having in their possession or control the firearms and the ammunition in question, that its probative force would have overridden its prejudicial

effect. I had earlier relied, in excluding such evidence, on the prejudicial effect in excluding such evidence of armed robbery.

The net result is that, if the *Boardman* case[4] had been cited to me or otherwise brought to my attention, I would have ruled that the evidence of armed robbery would have been admissible as the prejudicial effect of such evidence would have been overridden by the striking similarity of the evidence in question, for reason different from learned defence counsel's. I do hold that the evidence of the armed robbery was admissible as contended by learned defence counsel and that the *Boardman* case[4] is applicable in our courts as it has merely modified the ratio in the *Makin* case,[5] the latter case having been relied on and accepted in our courts for a long time (please see, eg *PP* v *Ong Kok Tan*[6]) and the reasoning of the learned Law Lords in *Boardman*[4] has impeccable logic.

Another point raised by the defence was that as distinct from the cautioned statements of both accused, the interrogation of both accused, was not reduced into writing under s 112 of the Criminal Procedure Code (FMS Cap 6). Section 112 says:

(i) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(ii) Such person shall be bound to answer all questions relating to such case put to him by such officer:

Provided that such person may refuse to answer any question the answer to which would have tendency to expose him to a criminal charge or penalty or forfeiture.

(iii) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(iv) A police officer examining a person under sub-section (i) shall first inform that person of the provisions of subsections (ii) and (iii).

(v) A statement made by any person under this section whether or not a caution has been administered to him under section 113(1) shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumb print as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish.

Please see the words 'whenever possible' in sub-s (v) above. 'Whenever possible' ought to mean in my view, 'whenever reasonably possible'. Here, within 24 hours or more, ie a short space of time, the robbery, the arrest, the making of statements under s 27 leading to recovery of revolvers, the search and finding of such revolvers, the making of cautioned statements, all took place, given the urgency of each in relation to the others, it was not reasonably possible for the interrogation to be reduced into writing. The point was therefore not of help to the defence.

As to the failure to put the accused persons into lock-up after 6pm in accordance with Lock-Up Rules, failure to comply with it would not have the effect of nullifying the trial at all as learned counsel seemed to suggest. I have indicated earlier that the circumstances attending the breach of this particular rule could not be compared with any justification with those in *Dato' Mokhtar Hashim*'s case[1] when the circumstances were held to amount to oppression, making the cautioned statement in question there inadmissible. Here the breach could possibly be met with some departmental disciplinary action, should the officers' conduct in question be considered ever grave enough by their superiors to merit such disciplinary action.

As to the cautioned statements of both accused, I found that the prosecution had proved beyond a reasonable doubt that they were voluntarily made in the sense that there was not any threat, inducement, or promise in question given or that the minds of both accused were affected by fear from oppression when giving the statements. I came to those conclusions after watching the accused and witnesses. The accused had failed to raise any reasonable doubt on the prosecution's case in those two trials-within-a-trial.

Even without the cautioned statements which incriminated the accused, there was a great deal of other evidence to show that both accused had told the police officers in question where they buried or threw their respective revolvers (as the case may be) at the respective spots in question. The revolvers were recovered and proved to be serviceable, they were produced in court as exhibits. I tried to ask myself if I was left with any serious (but not a fanciful) doubt at all about the prosecution case, and I found none despite what learned counsel had done for them. Without the cautioned statements, my conclusion as to their guilt would have remained the same, from the evidence led under s 27 of the Evidence Act 1950.

I therefore convicted the accused and passed sentences of death as required by the law on them.

Accused convicted.

Solicitors: *Paramjit & Co.*

Reported by *Mathavan Devadas*